MODULAR TROPICAL VENTURES (M) SDN BHD v. GEORGE VARUGHESE & ANOTHER CASE

HIGH COURT MALAYA, SHAH ALAM
WAN AHMAD FARID WAN SALLEH JC
[SUITS NO: 22NCVC-575-11-2015 & BA-22NCVC-129-03-2016]
27 JUNE 2018

LAND LAW: *Sale and purchase of properties – Ownership – Dispute – Whether plaintiff proved that he was legal or beneficial owner of properties – Whether plaintiff made payment for purchase of properties – Defendant's claim to ownership by virtue of trust deed – Whether trust deed a valid document – Whether plaintiff held properties on trust for benefit of defendant*

EVIDENCE: *Documentary evidence – Admissibility – Dispute as to ownership of properties – Admissibility of instruments relied on to prove beneficial ownership of properties – Whether irrevocable power of attorney valid – Whether members' resolution inadmissible – Whether there was legal impediment to recognise validity of trust deed*

The plaintiff in Suit 575 was a company under liquidation which was wound up by a court order dated 18 October 2011 while the defendant in Suit 575 (and the plaintiff in Suit 129) was a sole proprietor of a legal firm. The subject matter in these two actions was in respect of two properties, Unit E-37 and Unit E-38, in one commercial centre known as 3 Two Square ('the subject property'). By two separate sales and purchase agreements ('SPAs') between 3 Two Square Sdn Bhd ('3 Two Square') as the vendor and developer and the plaintiff as the purchaser, the plaintiff had agreed to purchase both units E-37 and E-38 for RM845,770 and RM779,200 respectively. The purchase of the subject property was financed by CIMB Bank Berhad ('CIMB') by way of a third-party charge through a financial package known as the Flexi Business Premises Facility ('the facility.') The borrowers of the facility were one Thanushia and one Suresh, who were the directors of the plaintiff before the latter's winding up. According to the letter of offer from CIMB, in respect of the facility, part of the security was that pending the issuance of separate strata titles in respect of the subject property, Thanushia and Suresh would have to execute a deed of assignment of the same in favour of CIMB. The plaintiff's case was that it was the rightful owner of the subject property. In Suit 575, the plaintiff was seeking for an order for the eviction of the defendant and the delivery of vacant possession of the subject property. On the other hand, the defendant claimed that he was the beneficial owner of the subject property by virtue of a trust deed ('TD') and an irrevocable power of attorney ('IPA'). Another document, the plaintiff's Members Resolution, which admissibility was in dispute purportedly resolved that the subject property was to be held on trust by the plaintiff for the defendant as the

beneficial owner of the same. The trust deed was entered into between the plaintiff as the trustee and the defendant as the beneficiary of the subject property. The IPA was also executed by the plaintiff in favour of the defendant, granting the defendant the absolute power to deal with the subject property. For the reasons aforesaid, the defendant in Suit 129, sought reliefs in the form of declaratory orders that the defendant was the beneficial owner of the subject property and that the plaintiff was holding the same in trust for the benefit of the defendant.

Held (dismissing plaintiff's claim in Suit 575; allowing defendant's claim in Suit 129):

(1) The plaintiff must show to the court that it was indeed the legal and beneficial owner of the subject property. The plaintiff's argument on its legal and beneficial interest was purely premised on the existence of the SPAs made between the plaintiff and 3 Two Square. Going by the tendency of the plaintiff to argue on the technicality of things on the admissibility and relevance of the three instruments relied on by the defendant (the TD, IPA and Members' Resolution), at the very least the plaintiff would be able to adduce some documentary evidence on its directors' resolution to even enter into the SPAs as well. The question arose as to whether there was any resolution on the part of the plaintiff's company as to the source of fund to finance the purchase of the subject property. Unfortunately, there was nothing before the court. (paras 45 & 47)

(2) On the IPA, the argument that it only took effect on the date it was deposited at the Registrar's office merit consideration. The IPA was only valid on the day it was deposited at the High Court's registry which was on 23 January 2015 ('the effective date'). There was therefore this legal impediment in that, by the time it was deposited, the plaintiff had already been wound up. There was no authority that would conclude that the validity of a power of attorney could be of retrospective effect from the date it was executed. Thus, the IPA was not valid since the plaintiff company would have no capacity to give the power of attorney by the effective date. Applying the law *mutatis mutandis*, the IPA would have been revoked by operation of law on 18 October 2011, which was the date the plaintiff company was wound up. (paras 52-55)

(3) The reason advanced by the defendant for not being able to produce the original TD was plausible *ie*, that he misplaced it when shifting office. This court also accepted the evidence of DW2 that the reprinted version of the TD was one and the same with the misplaced one. The oral evidence which was given by DW2 and the defendant came within s. 65(1)(e) of the Evidence Act 1950 ('the EA'). Since the reprinted

version of the TD was a copy made from the original by mechanical process, s. 65(1)(b) was equally applicable. Even if the second TD was not re-signed by the parties, it was still admissible under s. 65(1)(b) and (e) of the EA since DW2 categorically testified in no uncertain terms that the second TD was one and the same with the original TD. In any event, the original TD was dated 31 January 2008, well before the winding up of the plaintiff. There was therefore no legal impediment to recognise the validity of the TD. The TD was a valid document. (paras 64-68)

(4) The Members' Resolution was marked as ID. It was unarguable at law that a document marked as ID was not an exhibit and could not be relied upon. Thus, the Members' Resolution was inadmissible. (paras 48 & 49)

(5) Section 6.07 of the SPA is to protect the interest of the developer, 3 Two Square only. The TD did not in any way affect or prejudice the rights of the developer. The deed of assignment would only affect the validity of the SPA, TD and the facility agreement if and only if it would adversely affect the interest of the developer. Since the interest of the developer was not prejudiced, s. 6.07(1) of the SPAs did not operate so as to affect the validity of the TD and the facility. (paras 71-73)

(6) Since the maker of the TD had given evidence, there was no necessity for the defendant to call either Thanushia and Suresh to give evidence. Both of them were not material witnesses. Their presence would not throw any further light to the defendant's case and therefore s. 114(g) of the EA did not apply. (para 74)

(7) On the balance of probabilities, there was nothing that suggested that the plaintiff had made any payment towards the purchase of the subject property. It was not acceptable both at law and in equity for a party who had paid nothing towards the purchase of a property to be recognised as a beneficial owner. That was akin to unjust enrichment. This court accepted the defendant's evidence that he had paid the initial deposit, further part payment of RM200,000 each, maintenance, other relevant charges including quit rent, assessments and the monthly loan instalments pursuant to the facility in respect of the subject property. In the result, the TD was found to be valid and enforceable as against the plaintiff and that the plaintiff held the subject property on trust for the benefit of the defendant. (paras 75, 76, 78 & 79)

Case(s) referred to:

Joseph Thambirajah v. Bank Buruh (M) Bhd [2008] 2 MLJ 773 ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties) [2001] 6 CLJ 104 HC ***(refd)***

A *Kuppusamy Thandarayan & Ors v. Mohamed Abdul Kader Haji P P Shaukat Ali & Ors [2016] 1 LNS 1062 HC* ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
Malayan Banking Bhd v. Agencies Service Bureau Sdn Bhd & Ors [1982] CLJ 668; [1982] CLJ (Rep) 217 FC ***(refd)***
B *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC* ***(refd)***
Royal British Bank v. Turquand (1856) 119 ER 886 ***(refd)***
Shanta Manickam v. Teik Joo Chan Sdn Bhd & Anor [2015] 8 CLJ 611 HC ***(refd)***
Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***
C *Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim [1997] 2 CLJ 315 CA* ***(refd)***
Wan Salimah Wan Jaffar v. Mahmood Omar; Anim Abdul Aziz (Intervener) [1998] 1 CLJ 480 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 133, 223, 228, 233, 236
D Evidence Act 1950, ss. 65(1)(b), (e), 114(g)
Powers of Attorney Act 1949, ss. 4(1), 5
Stamp Act 1949, s. 51

For the plaintiff - Ranjan N Chandran, Bhavani Vadivelu & Nuriahtun Maria Samad; M/s Hakem Arabi & Assocs
E *For the defendant - S Satharuban, Anne Sangeetha Sebastian & Kalaivaanan Murthy; M/s Satha & Co*

Reported by Suhainah Wahiduddin

JUDGMENT

F **Wan Ahmad Farid Wan Salleh JC:**

[1] The plaintiff in Suit 575 is a company under liquidation. The plaintiff was wound up by a court order dated 18 October 2011 at the instance of one Simon James Andrew Scott. Pursuant to a court order dated 16 March 2012, one Encik Augustine TK James ("Encik Augustine") was appointed as the
G provisional liquidator to the plaintiff company. The nature of the order that outlined the duties of Encik Augustine (who is SP3 at the trial) by the winding up court are *inter alia* as follows:

(a) To carry out all the duties involved as the liquidator of the plaintiff company diligently in accordance with the provisions in the then
H Companies Act 1965 ("CA") which are *inter alia* ss. 228, 233 and 236; and

(b) To take all necessary and expedient measures in recording all assets owned by the plaintiff company and dispose of the same according to the
I market value.

[2] The subject matter that is in dispute in these two actions is in respect of two properties known as Lot E-37-03 ("Unit E-37") and Lot E-38-03 ("Unit E-38"), Type E in one commercial centre known as 3 Two Square, situated on part of the land held under HS(D) 240117, PT 8, Seksyen 36, Bandar Petaling Jaya, Selangor (collectively referred to as "the subject property").

[3] The defendant in Suit 575 (and the plaintiff in Suit 129) is a sole proprietor of a legal firm known as Messrs George Varughese.

The Sale And Purchase Of The Subject Property

[4] By two separate sales and purchase agreements ("SPAs") dated 30 November 2007 between 3 Two Square Sdn Bhd ("3 Two Square") as the vendor and developer and the plaintiff as the purchaser, the plaintiff had agreed to purchase both units E-37 and E-38 for RM845,770 and RM779,200 respectively.

[5] The purchase of the subject property was financed by CIMB Bank Berhad ("CIMB") by way of a third-party charge through a financial package known as the Flexi Business Premises Facility ("the facility"). The borrowers of the facility are A Thanushia ("Thanushia") and Suresh Supramaniam ("Suresh"). Both Thanushia and Suresh were the directors of the plaintiff before the latter's winding up.

[6] According to the letter of offer from CIMB dated 22 April 2008 in respect of the facility, part of the security was that pending the issuance of separate strata titles in respect of the subject property, Thanushia and Suresh would have to execute a deed of assignment of the same in favour of CIMB. The facility was for the sum of RM1,412,742 with a monthly instalment amount of RM7,671.

[7] The plaintiff's case is that it is the rightful legal owner of the subject property. In the circumstances, in Suit 575, the plaintiff is seeking for an order for the eviction of the defendant and the delivery of vacant possession of the subject property.

[8] On the other hand, the defendant claimed that he is the beneficial owner of the subject property by virtue of a trust deed ("trust deed") and an irrevocable power of attorney ("IPA") both dated 31 January 2008. There is another document, which admissibility is in dispute, which is the plaintiff's members resolution ("members resolution") dated a day prior to the execution of the SPAs. The members resolution purportedly resolved that the subject property are to be held on trust by the plaintiff for the defendant as the beneficial owner of the same. The trust deed was entered into between the plaintiff as the trustee and the defendant as the beneficiary

of the subject property. The IPA was also executed by the plaintiff in favour of the defendant, granting the defendant the absolute power to deal with the subject property.

[9] For the reasons aforesaid, the defendant (as the plaintiff) in Suit 129 has sought reliefs in the form of declaratory orders that the defendant is the beneficial owner of the subject property and that the plaintiff is holding the same in trust for the benefit of the defendant. The defendant sought further relief in Suit 129 for the plaintiff to execute a registrable memorandum of transfer in respect of the subject property in favour of the defendant as soon as the defendant takes steps to settle the loan and discharge the charge in favour of CIMB.

The Trial

[10] By consent of both parties, Suits 575 and 129 were heard together pursuant to my order dated 4 April 2016 as both matters involved the same parties.

[11] At the trial, the plaintiff had called four witnesses, including Encik Augustine, the liquidator to testify on its behalf. The defendant himself testified as SD4 and called three other witnesses. Neither Thanushia nor Suresh was called by either party.

The Plaintiff's Case

[12] The plaintiff's case is anchored on the basis that the plaintiff is the beneficial and rightful owner of the subject property. The plaintiff relied on two separate letters dated 19 June 2008 from 3 Two Square. The letters, which are identical with the exception to the reference of the respective units, were addressed to the plaintiff with the caption "delivery of vacant possession". The contents *inter alia* are as follows:

> We are pleased to inform that the construction of the abovementioned Property has been completed and we are now in the position to delivery *(sic)* vacant possession of the said Property to you.

Since the letters were clearly addressed to the plaintiff without any reference to the defendant howsoever, it is the plaintiff's contention that by necessary implication, the plaintiff's ownership of the subject property is confirmed and acknowledged by the developer, 3 Two Square.

[13] Secondly, the plaintiff relies on section 6.07(1) of the SPAs which stipulates that the plaintiff shall not transfer or otherwise assign the subject property without the written permission of the developer. Section 6.07(1) *inter alia* provides as follows:

> From the date of this Agreement and until the issue of separate strata title to the said Parcel and transfer of the same to the Purchaser in the manner stated herein the Purchaser shall not under any guise or pretext whatsoever sell, transfer, assign or dispose of all or any of the rights duties and obligations under this Agreement without the written permission of the vendor first and obtained …

[14] It is therefore the contention of the plaintiff that since there was no evidence of any written consent given by the developer to enable the plaintiff to execute the trust deed or the IPA, any purported attempt to otherwise dispose of the subject property would disentitle the defendant from claiming beneficial ownership of the same. Learned counsel for the plaintiff attracted my attention that the SPAs did not even mention the existence or otherwise make any reference to the purported trust deed, IPA or the members resolution.

[15] On the role of the liquidator in relation to the management of the subject property, it is contended that the liquidator has been paying maintenance fees, quit rent and the assessment of the same. In his witness statement, Yogananthan a/l Kanapathipillay who is SP2, testified that he had been handling the liquidation process of the plaintiff on behalf of the liquidator, Encik Augustine. In answer to Q20 of his witness statement, he testified as follows:

> Q20: Did the Liquidator incurred (*sic*) any expenses in regards to the said Unit upon being aware that the Unit belongs to MTVSB?
>
> A20: The Liquidator has been paying the maintenance fees, quit rent and cukai taksiran since we found out about the unit.

[16] Thirdly, in answer to the three-point argument of the defendant that he is the rightful beneficial owner of the subject property. On the members resolution, learned counsel for the plaintiff in no uncertain terms argued that a document marked as ID is not an exhibit and cannot be relied upon. During cross-examination, the defendant, who is SD4 even admitted that the liquidator was not handed with the aforesaid document since there was "no reason to" do so.

[17] On the IPA, which is marked as exh. D11, learned counsel for the plaintiff submitted that although it was dated 31 January 2008 it was only stamped on 21 January 2015 and deposited and registered with the High Court on 23 January 2015, some seven years later. It is the plaintiff's case that the late stamping and registration of the IPA goes to the weight of the same.

[18] Having argued on the aforesaid, learned counsel then referred me to the Federal Court case of *Letchumanan Chettiar Alagappan @ L Allagappan (As Executor to SL Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697 FC. The case is a proposition that the registration of a power of attorney ("PA") is a mere procedural requirement for the creation of a valid instrument. It did not follow that once registered, the PA is valid or genuine. Learned counsel then cross-referred the court to the case of *Wan Salimah Wan Jaffar v. Mahmood Omar; Anim Abdul Aziz (Intervener)* [1998] 1 CLJ 480; [1998] 5 MLJ 162. In that case, after having

A referred to s. 4(1) of the Powers of Attorney Act 1949 ("the 1949 Act"), the court held that the validity of the instrument creating a PA took effect once the true copy of the same the Senior Assistant Registrar marked it with the words "true copy" and so deposited it in his office.

B **[19]** It is therefore the argument of the plaintiff that since the IPA was only deposited in January 2015 which was after the winding up of the plaintiff, it could not be valid since the liquidator was not made aware of the existence of the instrument.

C **[20]** On the TD, learned counsel for the plaintiff also took exception on the fact that though the instrument was dated on 31 January 2008 it was only stamped on 21 January 2015. In any event, the TD that was exhibited as exh. D9 was not the original version but a reprinted version that was re-signed in 2012 by Thanushia and Suresh. It is the contention of the plaintiff that this could not be legally done since the plaintiff had already been wound up by then and both Thanushia and Suresh had no *locus* to sign the instrument D since by then the liquidator had already been appointed by the court.

[21] Learned counsel referred me to the Court of Appeal case of *Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim* [1997] 2 CLJ 315; [1997] 2 MLJ 526 CA. The Court of Appeal in the aforesaid case made reference E to the then Supreme Court judgment in *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436; [1991] 3 MLJ 325 SC which is the proposition that after a winding-up order is made, generally speaking, no one but the liquidator can act on behalf of the company.

F *On The Payments Towards The Purchase Of The Subject Property*

[22] The plaintiff's case is that there was no evidence at the trial for this court to conclude that the defendant had paid towards the purchase of the subject property. What was in evidence according to learned counsel for the plaintiff is that some of the payments were made through the client's account G of the defendant's legal firm. That learned counsel submitted, could not be related to the defendant having the beneficial ownership of the subject property.

[23] In any event, according to learned counsel for the plaintiff just because the defendant purportedly servicing the loan, it would not *ipso facto* make the H defendant the beneficial owner of the subject property.

[24] Further, the payments made towards quit rent, assessments and maintenance charges in respect of the subject property all have receipts issued in the name of "Modular Tropical Ventures Sdn Bhd". It is for this reason that learned counsel for the plaintiff submitted that the legal and beneficial I owner of the subject property must therefore be that of the plaintiff.

On The Presumption Of Adverse Inference

[25] Learned counsel for the plaintiff attracted my attention to the fact that the defendant had failed to call either Thanushia or Suresh to testify on his behalf. Thanushia was even listed in the defendant's list of witnesses. Her witness' statement was also filed. Thanushia's testimony must have been extremely relevant since, her footprint was everywhere – in the members resolution, TD and IPA. Those are the three instruments heavily relied upon by the defendant to support his contention that the subject property is beneficially his.

[26] Learned counsel for the plaintiff then referred me to s. 114(g) of the Evidence Act 1950 ("EA") and urged me to draw an adverse inference on the failure of the defendant to call Thanushia to testify. Reference was also made to the Court of Appeal case of *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627 CA where Mokhtar Sidin JCA in his speech made this remark:

> It is to be noted from the pleadings and the notes of evidence that it was the appellant who had asserted that Tan Sri Basir was the one who had made the offer. This was denied by the respondent throughout. As such, it is not in the interest of the respondent to call him. It is the respondent's case throughout that there was no offer by Tan Sri Basir and this has been supported by the evidence. In view of that we are of the opinion that the learned judge had applied the law correctly.

The Defendant's Response

[27] The defendant's version of the factual matrix of the case can be summarised as follows. According to the defendant, the subject property was purchased and paid for by the defendant at all material times.

[28] As to the deposit and further part-payments, the defendant testified that he had made those payments towards the purchase of the subject property.

[29] First, the sales confirmation in respect of Unit E-37 and Unit E-38 marked as exh. D18 and D17 respectively. According to the defendant, he paid both the initial deposits of RM5,000 each. He even filled in the sales confirmation forms.

[30] Secondly, the defendant then made further payments towards the purchase price of both the subject property.

[31] There were several letters from the defendant's legal firm addressed to Messrs Soo Thien Ming & Nashrah, the solicitors acting for 3 Two Square which according to the defendant, would indisputably show that he was the ultimate beneficial owner of the subject property. The first letter was dated 3 December 2007, marked as exh. 21, enclosing *inter alia* a cheque for the sum of RM72,920 being the balance of the deposit in respect of unit E-38.

[32] The second letter was dated 13 March 2008 where the defendant's legal firm had enclosed two separate CIMB cheques amounting to RM200,000 each towards the "balance of the purchase price" in respect of the two subject property.

[33] It is not in dispute that the two cheques of RM200,000 were issued from the defendant's client's account.

[34] Finally, there was this letter dated 14 April 2008 where a CIMB cheque for the sum of RM8,732.65 was enclosed for the interests incurred in respect of late payments towards the purchase price of both units. In the said letter, the details of payments thus far made for the subject property were tabulated as follows:

	Unit E-37	Unit E-38
Purchase Price	RM845,770	RM779,200
10% Deposit	RM84,577	RM77,920
Part Payment	RM200,000	RM200,000
Balance to be paid	RM561,193	RM501,280

[35] However, the defendant was unable to procure a loan to finance the balance of the purchase price of the subject property since according to him, he already had other existing loans under his name. It was for this reason that before the defendant decided to purchase the subject property, he had approached Thanushia, his long-standing friend to request her to secure a loan on his behalf which she agreed.

[36] It was after Thanushia's agreement that he proceeded with the payment of the initial deposits and signing of the sales confirmation of the subject property. The defendant explained the background of how it happened in answer to Q21 of his witness statement as follows:

> A: Yes, A Thanushia agreed to my request but asked that the purchase of the two (2) Properties be registered under her company by the name of MTVSB in which she was a Director and Shareholder. This was because she had just revived the business of MTVSB, which was dealing in properties, and having the two (2) properties listed in the books would enhance its profile. She also informed me that the loan will be taken in her personal name and in the name of Suresh A/L Supramaniam, who was also a Director and Shareholder of MTVSB and that a third party first charge will be created in the two (2) properties.

It was in consideration of the defendant's consent to allow the subject property to be registered in the plaintiff's name and both Thanushia and Suresh secured the facility from CIMB. The understanding was such that the defendant would have to service the facility. Towards this end, on 8 September 2012, Thanushia had authorised the defendant to handle the account by way of an instruction to CIMB. The letter was marked as exh. D39.

[37] Both Thanushia and Suresh then procured the three disputed instruments – the members resolution, TD and IPA. The TD and IPA were ostensibly issued on behalf of the plaintiff company.

[38] The defendant then occupied Unit E-38 since 2009 where he operated his legal firm and there was no objection from the plaintiff then. As to Unit E-37, the defendant had rented it out to one Bright Life Event Planners Sdn Bhd ("Bright Life") pursuant to a tenancy agreement dated 10 June 2011 which is in exh. D36 for a sum of RM5,600 per month. It is the defendant's case that as a result of the misrepresentation made by the liquidator, Bright Life had terminated the tenancy agreement and paid the sum of RM16,800 being the three-month deposit of the tenancy which sum, according to the defendant, was wrongfully accepted by the liquidator. The said deposit should have been rightfully returned to the defendant.

[39] In any event, the amount of RM16,800 was nowhere reflected in the liquidator's account of receipts and payments and statement of position for the accounting period of 16 September 2015 to 15 March 2016. Since there was no evidence that the sum of RM16,800 was deposited into the plaintiff's account which according to the defendant, the *bona fide* of the liquidator in conducting the affairs of the plaintiff is therefore put into question.

[40] Learned counsel for the defendant submitted the arrangement made between the defendant and Thanushia and Suresh did not in any way contravene s. 133 of the former Companies Act 1965 ("CA"). This is for the simple reason that s. 133 is not applicable to an exempt private company which the plaintiff is. In any event, the facility granted by CIMB was not to the plaintiff but to Thanushia and Suresh in their personal capacities. This is even conceded by SP2 during cross-examination:

D/C: Now, who are the borrowers of this loan?

SP2: Ms Thanushia and Mr Suresh Supramaniam.

D/C: And the loan is taken in their personal capacity?

SP2: Yes.

[41] The status of the defendant as the exempt private company was also confirmed by SP4, Suhaila Zainal Abidin, an officer from the loan department of CIMB. During cross-examination, she conceded that CIMB had obtained written confirmation from its solicitors as to the status of the plaintiff as an exempt private company.

[42] On whether there was an attempt to dispose of the property after the commencement of the winding-up proceedings under s. 223 of the former CA, learned counsel for the defendant referred me to a plethora of authorities and concluded that the aforesaid section has no application. In short, counsel's argument is that the disposition of the subject property does not arise since the ownership of the same vests in the defendant, at least beneficially. In any event, no monies were paid by the plaintiff in respect of the subject property.

[43] I now come to the next point raised by the defendant. It is this. For all intents and purposes, the plaintiff is a bare trustee holding the subject property on trust for the defendant. The plaintiff, although the owner of the subject property pursuant to the SPA had not paid any monies towards the purchase price. Every single payment towards the purchase price of the subject property, be it the initial deposit, further part payment of RM200,000 each, maintenance, other relevant charges including quit rent and assessments was all made by the defendant. More importantly, the monthly loan instalments to CIMB pursuant to the facility were paid by the defendant. The defendant did not default in the monthly instalments notwithstanding the fact that the plaintiff has been wound up and placed under liquidation.

The Analysis

[44] From the outset, let us be clear about one pertinent matter. It is this. Suit 575 was initiated by the plaintiff through the liquidator for an order that the defendant do deliver vacant possession in respect of the subject property. In short, the plaintiff is saying that by remaining in the subject property either by himself or by renting it out, the defendant is a trespasser. Conspicuously missing in the prayers as reflected in para. 16 of the statement of claim is a declaratory relief that that plaintiff is indeed the legal and beneficial owner of the subject property.

[45] Be that as it may, before this court could accede to the prayers sought by the plaintiff, at the very least the plaintiff must show to the court that it is indeed the legal and beneficial owner of the subject property.

[46] What are the evidence that the plaintiff has tendered to prove that it is the legal and beneficial owner of the subject property? Did the plaintiff adduce any evidence that it was the one which paid the booking fees as reflected in the sales confirmation? Did the plaintiff adduce any evidence that

it had paid the remaining balance of the 10% deposit as stated in the SPAs? Assuming for one moment that the RM200,000 further part payments for each of the units which were paid from the defendant's client's account did not belong to the defendant personally, did the plaintiff adduce any evidence of the money trail that it had deposited a total of RM400,000 to the said account?

[47] The plaintiff's argument on its legal and beneficial interest is purely premised on the existence of the SPAs made between the plaintiff and 3 Two Square. Further, the plaintiff had launched a highly technical argument on the admissibility of the three instruments relied on by the defendant and urged this court to ignore each and every document thus adduced. In spite of the massive attack and blitzkrieg launched by the plaintiff on the three instruments, one important issue which I must say crucial to the plaintiff's case, has been left out unattended. It is this. Going by the tendency of the plaintiff to argue on the technicality of things on the admissibility and relevance of the three instruments, I would have thought that at the very least the plaintiff would be able to adduce some documentary evidence on its directors' resolution to even enter into the SPAs as well. Was there any resolution on the part of the plaintiff's company as to the source of fund to finance the purchase of the subject property? Unfortunately, there was nothing before the court.

The Members Resolution

[48] Learned counsel for the plaintiff submitted that the SPAs made no reference at all to the three instruments. Before proceeding further, let me make a ruling on the admissibility of the members resolution. It was marked as ID. I think the law is quite settled on this. I can only refer to the judgment of the Court of Appeal in *Joseph Thambirajah v. Bank Buruh (M) Bhd* [2008] 2 MLJ 773 CA when it held that:

> We are of the view that the third letter of demand cannot be considered at all because it was not tendered in court by any witness of respondent. It was only an identification document ('ID') in the non-agreed bundle and was never converted to a court exhibit.

In a more recent case of *Shanta Manickam v. Teik Joo Chan Sdn Bhd & Anor* [2015] 8 CLJ 611; [2015] 11 MLJ 721 the High Court reiterated the same proposition in that it was unarguable at law that a document marked as ID is not an exhibit and cannot be relied upon.

[49] I would therefore disregard the evidence and hold that the members resolution is inadmissible.

[50] The defendant is therefore left with two remaining instruments which are the TD and IPA.

A

The Irrevocable Power Of Attorney

[51] Learned counsel for the plaintiff in his usual forceful self, submitted that the TD and IPA were not even referred to in the SPAs for them to be clothed with some form of legitimacy. However, with respect, there is a flaw in this line of argument. The SPAs were both dated 30 November 2007 whilst the TD and IPA were dated on 31 January 2008. The SPAs could not possibly make reference to the TD and IPA when the former were executed two months earlier.

B

[52] However, on the IPA, I think the argument that it only took effect on the date it was deposited at the Registrar's office merits consideration. As can be seen from exh. D-11, the IPA was only deposited on 23 January 2015 at the Deputy Registrar's office. The defendant, in answer to Q66 of his witness statement, attempted to explain the delay as follows:

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> A66: As I understand the law, these documents are perfectly legal and valid documents and are binding on the parties. The documents only need to be stamped if they are to be used in a Court of Law. The arrangement I had with A Thanushia and Suresh a/l Supramaniam and MTVSB is of a personal and friendly nature. The arrangement was of an informal nature and that is the reason why I decided not to stamp the documents at the time.
>
> But, when I received the Notice of demand dated 13th January 2015 from Messrs Hakem Arabi & Associates in respect of the two (2) Properties and demanding vacant possession of the same, I realised that there was a problem and I then stamped both the Trust Deed and the Irrevocable Power of Attorney and registered the Irrevocable Power of Attorney in the High Court. This is because I knew that these documents are important for use in the Court since there were Solicitors acting for the Liquidator and it appeared that the matter would be litigated in Court.

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I can appreciate that the issue of the legality of a document does not depend on whether it is stamped or not. That goes to the admissibility. And once a document is stamped, no matter how late, provided the proper penalty is paid, it is admissible in the court of law. If any authority is needed on the aforesaid proposition, it can be seen in the Federal Court case of *Malayan Banking Bhd v. Agencies Service Bureau Sdn Bhd & Ors* [1982] CLJ 668; [1982] CLJ (Rep) 217; [1982] 1 MLJ 198 FC, where it was held that an unstamped document could be received in evidence on payment of the penalty provided under s. 51 of the Stamp Act 1949.

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[53] Having said that, I must however underline that a power of attorney is no ordinary document. Its validity goes beyond the stamping. It is governed by the 1949 Act where specific procedures must be adhered to before it becomes valid. The issue here is not that of admissibility. It

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concerns the date of validity of the IPA itself. On the authority of *Wan Salimah bte Wan Jaffar*, I agree with the argument by learned counsel for the plaintiff that the IPA is only valid on the day it was deposited at the High Court's registry which is on 23 January 2015 ("the effective date").

[54] There is therefore this legal impediment in that, by the time it was deposited, the plaintiff had already been wound up. Despite my research on this point of law, I cannot find any authority that would allow me to conclude that the validity of a power of attorney could be of retrospective effect from the date it was executed. For the aforesaid reason, it is my finding that the IPA is not valid since the plaintiff company would have no capacity to give the power of attorney by the effective date.

[55] Even if we assume for one moment that the IPA was deposited on the date of its execution, which was on 31 January 2008, the status of the same stands revoked on the winding up of the plaintiff company on 18 October 2011. I find support in the aforesaid proposition by making reference to s. 5 of the 1949 Act which provides that a power of attorney continues to be valid and in force, until a receiving order has been made against the donor in bankruptcy. Applying the law *mutatis mutandis*, the IPA would have been revoked by operation of law on 18 October 2011.

[56] To conclude at this stage, it is my finding that the IPA is therefore invalid.

The Trust Deed

[57] In view of my earlier rulings on the admissibility and validity of the members resolution and IPA respectively, the defendant's case now hinges on the validity of the TD.

[58] As aforesaid, learned counsel launched a two-pronged attack of the TD in that it was only stamped on 21 January 2015 well after the winding up of the plaintiff company in 2011. Secondly, the TD that was exhibited as exh. D9 was not the original version but a reprinted version that was re-signed in 2012 by Thanushia and Suresh.

[59] DW2, Johan Mohan Abdullah in his witness statement testified that the TD was executed on 31 January 2008 and that he was the attesting witness to the defendant's signature. He also prepared the TD on the defendant's instruction. Although the "second" TD was re-signed in 2012, DW2 confirmed that the contents of the two TDs are one and the same, which was executed in his presence. In answer to Q18 of his witness statement, DW2, who is an advocate and solicitor, testified as follows:

A

Q18: Do you have personal knowledge of the two (2) Trust Deeds executed on 31st January 2008 and the Trust Deed executed sometime in the year 2012?

A18: Yes, I have personal knowledge of the two (2) Trust Deeds.

B **[60]** The defendant's explanation on the unavailability of the original TD was that he misplaced it when shifting office sometime in 2009. The only other copy was in the custody of the plaintiff ("the plaintiff's copy"). When asked about why did not he asked the copy of the same from the plaintiff in 2009, which was prior to the latter's liquidation, the defendant answered that at the material time there was no reason for him to go and look for the C instrument. The need only arose when he received the letter of demand dated 13 January 2015 from the plaintiff's solicitors demanding vacant possession of the subject property.

[61] It was at that time when the defendant started to look for the plaintiff's copy of the TD. By then it was already too late. In answer to the plaintiff's D counsel during cross-examination the defendant had this to say:

That I had misplaced the documents. I then checked with MTVSB, they said the documents have been sent to the liquidators. Prior to that there was no need for me to look at this document on a daily basis.

E In short, the defendant did not have the custody of the original TD. He could not get the remaining copy from the plaintiff. The attesting solicitor, DW2, did not keep any copy either. It was under these surrounding circumstances that the defendant instructed DW2 to prepare and fair a second TD for the same to be re-signed by the parties.

F **[62]** During the course of the trial and after listening to the respective arguments, I intimated to both parties that I would accept the second TD as a reprinted version. DW2 testified that he prepared the TD, handed all the copies to the latter's safekeeping. Subsequently, he came to know that the defendant had misplaced the TD when the defendant shifted office. This is G how he narrated the turn of event:

I was instructed by the Defendant to re-print the Trust Deed prepared earlier for execution by the parties. I faired the Trust Deed and went to the Defendant's office. At the Defendant's office, the two (2) Directors of MTVSB and the Defendant was waiting for me. I witnessed the Defendant's signature under the name of Johan Mohan bin Abdullah.

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[63] DW2 confirmed that he had personal knowledge of the TD, and further confirmed that the two TDs are one and the same. He also confirmed that the original TD was executed by the defendant in his presence.

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[64] It is my finding that the reason advanced by the defendant for not being able to produce the original TD is plausible and I accept it. I also accept the evidence of DW2 that the reprinted version of the TD is one and the same with the misplaced one. He prepared it and his task as per the defendant's instruction was only to re-print it. Learned counsel for the defendant referred me to the case of *Kuppusamy Thandarayan & Ors v. Mohamed Abdul Kader Haji P P Shaukat Ali & Ors* [2016] 1 LNS 1062; [2016] MLJU 1217 where my learned brother Collin Lawrence Sequerah JC (now J) took cognisance that some litigants produced the originals of their respective deed of assignments or sale agreements, some only produced photocopies of the agreements and deeds of assignments. Some testified that the originals were no longer with them either because they were misplaced or destroyed over time.

[65] This is where s. 65(1) of the EA comes into operation. Section 65(1)(b) for example provides that secondary evidence includes "copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies". Sub-section (e) even says that secondary evidence includes "oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means". It is my finding that the oral evidence which was given by SD2 and the defendant come within the ambit of s. 65(1)(e) of the EA. Since the reprinted version of the TD is a copy made from the original by mechanical processes, I also hold that s. 65(1)(b) is equally applicable. In *Kuppusamy*, after having referred to *Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties)* [2001] 6 CLJ 104 the learned JC made these observations:

> In respect of those Plaintiffs who did not produce the originals and had testified and given plausible reasons as to why the originals were not produced, for example, they were lost or that they were unsure if they still had the originals, and taking note of the fact that these documents were executed many years ago, I allowed secondary evidence of these documents to be admitted and marked as exhibits in accordance with the above section 65(1)(c) and (2)(a) and section 73A(2) of the Evidence Act 1950.

[66] In fact, I would venture further so as to find that even if the second TD was not re-signed by the parties, it is still admissible under s. 65(1)(b) and (e) of the EA since DW2 categorically testified in no uncertain terms that the second TD was one and the same with the original TD. DW2 was the maker of the instrument. I have had the advantage of observing him giving evidence and find him to be a professional's professional. I accept his evidence as being truthful.

[67] In any event, the original TD was dated on 31 January 2008, well before the winding up of the plaintiff. There is therefore no legal impediment for this court to recognise the validity of the TD.

[68] After having analysed the totality of the evidence, it is my finding that the TD is a valid document. The failure of the plaintiff to lodge the same with the Companies Commission of Malaysia ("SSM") does not in any way affect its validity as against the defendant.

[69] It is to be noted that the Federal Court in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 FC reiterated the applicability of the *Turquand* rule in Malaysia; see *Royal British Bank v. Turquand* (1856) 119 ER 886. The Malaysian apex court held that the rule protects outsiders dealing with the company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed, and are not bound to inquire whether acts of internal management have been regular. The rule gives rise to an irrebuttable presumption, that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular or unauthorised.

[70] In the circumstances, the *Turquand* rule does not cast a duty upon an outsider, such as the defendant, contracting with a company, to conduct an investigation as to the capacity of the company officials dealing with him.

[71] The next question that arises is whether the TD is caught by section 6.07(1) of the SPA which in a way prevents the plaintiff from selling, transferring, assigning or otherwise disposing of all or any of the rights duties and obligations under the SPA. With respect, the aforesaid section in the SPAs was to protect the interest of the developer, 3 Two Square. Only if the attempt to assign the right under the SPAs that prejudiced the position of the developer would the SPAs be put into question.

[72] The TD did not in any way affect or prejudice the rights of the developer. In so far as the developer is concerned, the dealings had been completed and perfected and the full amount of the purchase price had been paid.

[73] It is not in dispute that both Thanushia and Suresh had executed a deed of assignment in favour of CIMB pursuant to the facility. There was no evidence before this court that the consent of developer was obtained either. If we were to extend the proposition as suggested by learned counsel for the plaintiff, does that mean the facility utilised by Thanushia and Suresh was equally invalid? What would that entail if the whole facility was invalid? As aforesaid, and it is worth repeating here, that the assignment would only affect the validity of the SPA, TD and the facility agreement if and only if

it would adversely affect the interest of the developer. Since it is my finding that the interest of the developer was not prejudiced, section 6.07(1) of the SPAs does not operate so as to affect the validity of the TD and the facility.

[74] Since the maker of the TD has given evidence, there is no necessity for the defendant to call either Thanushia or Suresh to give evidence. Both of them are not material witnesses unless the defendant's case hinges completely and entirely on the members resolution which I have found to be inadmissible anyway. Their presence would not throw any further light to the defendant's case and I therefore hold that s. 114(g) of the EA does not apply.

[75] Finally, I have gone through the documentary evidence and the testimonies of the witnesses and could not find anything, on the balance of probabilities, that even suggests that the plaintiff had made any payment towards the purchase of the subject property. SP2's testimony is not corroborated by any contemporary document and is therefore disregarded.

[76] I cannot find it acceptable both at law and in equity for a party who has paid nothing towards the purchase of a property to be recognised as a beneficial owner. That is akin to unjust enrichment. In the course of the oral submissions, I had asked learned counsel for the plaintiff what would be the attendant consequences if one fine day the defendant opts to stop making the monthly payment towards the facility.

[77] Encik Ranjan Chandran is gracious enough to have conceded that if the subject property is auctioned off, the plaintiff would be left, not to put too fine a point on it, high and dry.

[78] I accept the defendant's evidence that he had paid the initial deposit, further part payment of RM200,000 each, maintenance, other relevant charges including quit rent, assessments and the monthly loan instalments to CIMB pursuant to the facility in respect of the subject property. The RM200,000 further part payment for each of the units were made *albeit* from the clients' account, on 13 March 2008. That was more than ten years ago. I take cognisance that if the defendant had used somebody else's money instead of his own in the issuance of the said cheques, he would have been disbarred by now.

[79] In the result, I find the TD to be valid and enforceable as against the plaintiff and that the plaintiff holds the subject property on trust for the benefit of the defendant.

[80] For the aforesaid reasons, the plaintiff's claim in Suit 575 is dismissed with costs of RM50,000 subject to allocatur. As a consequential order, the defendant's claim in Suit 129 is allowed in terms of the prayers in para 37 (a), (b), (c), (d), (e), (g), (h) and (i) of the statement of claim.

[81] In terms of general damages in para 37(f) and in view of the fact that the plaintiff is under liquidation, I am only allowing a nominal damages of RM5,000.

[82] By way of post-script, I must commend Encik Ranjan and Dato' S Satharuban together with their respective learned and able assistants for their meticulous research and powerful submissions that had assisted me in determining and disposing of the instant case.